EFFECTIVE MOTIONS PRACTICE
2018 New Immigration Judge Training

MOTIONS – BASICS

- Only an alien who is in proceedings before the Immigration Court or the DHS may file a motion.
- An IJ has no authority over a motion if a charging document has not been filed with the Immigration Court (except for custody redetermination).
- If an IJ has already decided a case, and no appeal has been filed, the IJ has jurisdiction over a subsequently-filed motion.
- When a motion to reopen is opposed by either party, the IJ must state in writing the reasons for the decision. *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984). This is a good practice to follow whenever any type of motion is opposed.
- Statements made by counsel in a motion are not evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).
- Substance and not label of motion controls. *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991).

RESPONSES

- A motion is deemed unopposed unless a timely response is made. 8 C.F.R. § 1003.23(a); *see also Immigration Court Practice Manual*, Chapter 5.13; *cf.* 8 C.F.R. § 1003.2(g)(3) (stating that opposing party has 13 days to respond to a motion, and the motion is deemed unopposed if no timely response is made).
- For **non-detained master calendar** hearings, any filing (presumably including a motion) must be submitted at least 15 days prior to the hearing if the party is requesting a ruling prior to or at the hearing; any response must be submitted within 10 days after the original filing.
- If the submission is less than 15 days prior to the master calendar hearing, the response may be presented orally or in writing at the hearing. *See Immigration Court Practice Manual*, Chapter 3.1(b)(i)(A).
- For **non-detained individual calendar** hearings, any filing (presumably including a motion) must be submitted at least 30 days prior to the hearing; any response must be submitted within 10 days after the original filing**.** *See Immigration Court Practice Manual*, Chapter 3.1(b)(i)(B).
- For master calendar and individual calendar hearings involving **detained aliens**, filing deadlines are specified by the Immigration Court. *See Immigration Court Practice Manual*, Chapter 3.1(b)(i)(A), (B).

- A response to a motion to reopen to rescind an *in absentia* order in removal proceedings is due within **10** days after the motion was received by the Immigration Court, unless otherwise specified by the IJ. *See Immigration Court Practice Manual*, Chapter 5.9(d)(ii)(C) (Updated 10/20/17).

MOTIONS TO CONTINUE

***See* Operating Policies and Procedures Memorandum (OPPM) 17-01, Continuances; it supplements and amends OPPM 13-01. Effective July 31, 2017.**

- "The Immigration Judge may grant a continuance for good cause shown." 8 C.F.R. § 1003.29.
- Lack of preparation: An alien "at least must make a reasonable showing that the lack of preparation occurred despite a diligent good faith effort to be ready to proceed and that any additional evidence he seeks to present is probative, not cumulative, and significantly favorable to the alien. *Matter of Sibrun*, 18 I&N Dec. 354, 356 (BIA 1983).
- For appellate purposes, the decision to grant or deny is within the sound discretion of an IJ, and the IJ's decision will not be reversed unless the alien demonstrates that denial caused "actual prejudice and harm and materially affected the outcome of his case." *Matter of Sibrun*, 18 I&N Dec. 354, 356-57 (BIA 1983).
- Pending post-conviction motions generally do not constitute good cause for a continuance because they do not negate the finality of the conviction for immigration proceedings. *See*, e.g., *Matter of Madrigal*, 21 I&N Dec 323, 327 (BIA 1996).
- An alien may seek deferred action status from DHS at any stage of the proceedings and it is not error for an IJ to deny continuance request for alien to pursue such relief. *Matter of Quintero*, 18 I&N Dec. 348 (BIA 1982).
- An IJ should generally not continue a case solely for an alien to demonstrate rehabilitation from criminality for relief purposes, because doing so defeats the purpose of instituting proceedings as soon as possible after a conviction. *Matter of Silva-Rodriguez*, 20 I&N Dec. 448 (BIA 1992); *see also Matter of Garcia-Reyes*, 19 I&N Dec. 830 (BIA 1988).
- The Attorney General is currently reviewing whether good cause exists to prant a continuance in order for a collateral matter to be adjudicated. *See Matter of L-A-B-R-*, 27 I&N Dec. 245 (A.G. 2018).

Pending family-based visa petition. An unopposed motion to continue to await USCIS adjudication of a pending family-based visa petition "should be generally be granted" if its approval would render alien *prima facie* for adjustment of status. Non-exhaustive list of factors to consider if good cause for continuance has been established include: (1) the DHS's response; (2) whether underlying visa petition is *prima facie* approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent merits adjustment of status as a matter of discretion; (5) and the reason for the continuance and any other relevant procedural factors. *Matter of Hashmi*, 24 I&N 785 (BIA 2009).

- Case completion goals alone are not a legitimate basis to deny continuance to await adjudication of a pending visa petition. But, an IJ can consider the number and length of continuances previously granted for petition to be filed on the respondent's behalf.
- DHS responses should be evaluated, but its opposition alone is insufficient to deny motion for continuance.
- IJs may ask to see applications, documents, and any required waivers to evaluate if the respondent is *prima facie* eligible for adjustment of status.
- Delay not attributable to the respondent augurs in favor of granting continuance. (Which party is most responsible for the delay?)
- IJs must "articulate, balance, and explain" all relevant factors in determining whether to deny continuance request -- failure to provide a reason is an abuse of discretion. *Matter of Hashmi*, 24 I&N Dec. 785, 794 (BIA 2009).
- *Hashmi* analysis was extended to **pending I-140** (employment based) context in *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009). However, the mere pending of a labor certification is generally not sufficient to grant continuance.
- In determining whether to continue for adjudication of pending **"U" nonimmigrant visa**, an IJ should consider (1) DHS's response to alien's motion to continue; (2) whether the underlying visa is *prima facie* approvable; and (3) the reason for the continuance and other procedural factors. *Matter of Sanchez-Sosa*, 25 I&N Dec. 807 (BIA 2012). To show *prima facie* eligibility for a U visa, an alien must have suffered substantial physical or mental abuse as the innocent victim of a qualifying crime for which the alien has been, is being, or will be helpful to law enforcement, which ordinarily requires an approved law enforcement certification. An alien who has filed a *prima facie* approvable petition for a U visa with USCIS will usually warrant a favorable exercise of discretion for a continuance. Good cause to continue will ordinarily not be shown if a law enforcement certification has not been approved, absent DHS support or other compelling circumstances. *Id*. If an alien is inadmissible, such as due to crimes, an IJ should assess the likelihood that USCIS will exercise its discretion favorably. *Id*.

MOTIONS TO ADVANCE

Motions to advance are generally disfavored, but may be appropriately filed when there is imminent *ineligibility* for relief or there is a health crisis necessitating immediate IJ action. *See Immigration Court Practice Manual*, Chapter 5.10(b). Such motions are also commonly filed when an alien wishes to withdraw all applications for relief and seeks to depart voluntarily within a specific time frame.

MOTIONS TO CHANGE VENUE

***See* New Operating Policies and Procedures Memorandum (OPPM) 18-01: Change of Venue. This OPPM replaces OPPM 01-02. Effective January 17, 2018.**

- "The Immigration Judge, for good cause, may change venue only upon motion by one of the parties, and after the charging document has been filed with the Immigration Court." 8 C.F.R. § 1003.20(b).
- A motion may be granted only after the other party has been given notice and an opportunity to respond.
- "No change of venue shall be granted without identification of a fixed street address, including city, state and ZIP code …." 8 C.F.R. § 1003.20(c).
- The motion should be made in writing and supported by evidence, and should contain the following information: (1) date and time of next hearing; (2) an admission or denial of the factual allegations and charge(s) contained in the Notice to Appear; (3) a designation or refusal to designate a country of removal; (4) a description of the basis for eligibility; (5) the address and telephone number of the location at which the respondent will be residing if the motion is granted; (6) if the address at which the alien is receiving mail has changed, a properly completed Alien's Change of Address Form, Form EOIR-33/IC); and (7) a detailed explanation of the reasons for the request. *See Immigration Court Practice Manual*, at Chapter 5.10(c).
- It is not unreasonable for an IJ to deny a motion to change venue when issues of removability have not yet been resolved. *See generally Matter of Chow*, 20 I&N 647 (BIA 1993); *Matter of Rivera*, 19 I&N Dec 688 (BIA 1988).
- The decision to grant is discretionary. Various factors to consider include: administrative convenience; expeditious treatment of case; location of witnesses; cost of transporting witnesses or evidence to a new location; alien's place of residence. *Matter of Rahman*, 20 I&N Dec. 480 (BIA 1992).
- The mere fact an alien wishes to reside in another city does not generally outweigh DHS opposition, particularly if DHS can establish prejudice. *Matter of Rahman*, 20 I&N Dec. 480, 484 (BIA 1992).
- Prejudice to DHS with respect to cost of transporting witnesses to hearing is a relevant factor to consider. *Matter of Rivera*, 19 I&N Dec 688, 690 (BIA 1988).
- Accommodation of alien's choice of distant counsel is not required, especially when it has not been established that local counsel is unavailable. *Matter of Rahman*, 20 I&N Dec. 480, 484 (BIA 1992).
- The mere filing of a motion to change venue does not relieve the respondent of his obligation to appear. *Matter of Patel*, 19 I&N Dec. 260, 262 (BIA 1985), *aff'd*, *Patel v. INS*, 803 F.2d 804 (5th Cir. 1986).

MOTIONS TO CONSOLIDATE or SEVER

- The Board, citing to a prior version of the regulations (8 C.F.R. § 242.8(a)), noted that IJs may take any action consistent with applicable laws and regulations as may be appropriate to the disposition of a case, and, thus, subject to due process requirements, an IJ had the implicit authority to consolidate the cases of different respondents to promote administrative efficiency. *Matter of Taerghodsi*, 16 I&N Dec. 260 (BIA 1977) (note that similar regulation is now found at 8 C.F.R. § 1003.10(b)). However, the alien must be able to fully litigate his or her claim, and the IJ must be mindful to consider evidence only as it relates to a particular alien. *Matter of Taerghodsi*, 16 I&N Dec. 260, 263 (BIA 1977).
- However, consolidation is generally limited to cases involving immediate family members. The Practice Manual presumes consolidation only upon filing of motion by a party. *Immigration Court Practice Manual*, at Chapter 4.21(a). An IJ may similarly sever cases in the exercise of discretion upon the filing of a motion by a party. *Immigration Court Practice Manual*, at Chapter 4.21(b).

MOTIONS FOR SUBSTITUTION OF COUNSEL

- Motions may be made orally or in writing, accompanied by Notice of Entry of Appearance of Attorney or Representative, Form EOIR-28.
- Written motions should include: (1) the reasons for the substitution of counsel; (2) evidence that prior counsel has been notified about the motion; and (3) evidence of the alien's consent to the substitution of counsel.
- IJs should consider reasons for the motion, and length of time prior to next scheduled hearing (continuances based on substitution of counsel are not favored). *See Immigration Court Practice Manual* Chapter 2.3(i)(i).
- There is no need for prior counsel to file motion to withdraw if motion to substitute is granted, however, until such motion is granted the original counsel remains the attorney of record.

MOTIONS TO WITHDRAW AS COUNSEL

- May be made orally or in writing and must be filed when an attorney wishes to withdraw as counsel when the alien has not obtained new counsel.
- Written motions should include: (1) the reasons for withdrawal; (2) the last known address of the alien; (3) a statement that the attorney has notified the alien of the request to withdraw or, if alien could not be notified, an explanation of the efforts made to notify the alien; (4) evidence of the alien's consent to withdraw or a statement as to why evidence of consent is not obtainable; and (5) evidence that the attorney notified,

or attempted to notify, the alien of pending deadlines, time and location of next hearing, the necessity of meeting deadlines and appearing at hearings and the consequences of failing to do so. *See Matter of Rosales*, 19 I&N Dec. 655 (BIA 1988); *see also Immigration Court Practice Manual* Chapter 2.3(i)(ii).

- IJs should consider time remaining before next hearing and the reasons given for the motion.
- Until the motion is granted, counsel remains attorney of record and must attend hearings.

MOTIONS TO ADMINISTRATIVELY CLOSE

- There is no statute or regulation providing for administrative closure. *Matter of Castro-Tum*, 27 I&N Dec. 271, 282 (A.G. 2018). The regulations provide for administrative closure only in specific categories of cases. *Id*. at 273, 275-77.
- The Attorney General declined to exercise his general authority and holds that administrative closure is appropriate only for cases in which it is authorized by regulation or a judicially approved settlement. *Castro-Tum*, 27 I&N Dec. 271, 273 (overruling *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012, *Matter of W-Y-U*, 27 I&N Dec. 17 (BIA 2017), and all prior inconsistent Board decisions).
- Prior to *Castro-Tum*, administrative closure historically had been an important, well-established, and longstanding procedure in Immigration Court proceedings.
- Administrative closure of proceedings was merely an administrative convenience which allowed the temporary removal of cases from the docket in certain situations. *See Castro-Tum*, 27 I&N Dec. 271, 273-74 (citing to *Matter of Amico*, 19 I&N Dec. 652 (BIA 1988)).

MOTIONS FOR SUBPOENAS AND DEPOSITIONS

- If an IJ is satisfied that a witness is not reasonably available at the place of hearing and that the testimony of such witness is essential, the IJ may order the taking of a deposition. The order shall designate the official by whom the deposition shall be taken, may prescribe and limit the content, scope, or manner of taking the deposition, and may direct the production of documentary evidence. 8 C.F.R. § 1003.35(a).
- An IJ has exclusive jurisdiction to issue subpoenas requiring the attendance of witnesses or for the production of evidence, or both. The subpoena may be issued on the IJ's own volition or upon application of a party. 8 C.F.R. § 1003.35(b)(1).
- If a party seeks a subpoena, he or she must state in writing or at the hearing, what is expected to be proven, and the party must show affirmatively that diligent efforts were made, without success, to produce the same. 8 C.F.R. § 1003.35(b)(2).
- Upon being satisfied that the witness will not appear to testify or produce evidence and the testimony or evidence is "essential," the IJ "shall" issue a subpoena. 8 C.F.R. § 1003.35(b)(3).
- The subpoena recipient must be over age 18. 8 C.F.R. § 1003.35(b)(5).

- If a subpoena is ignored, the IJ "shall request" the United States Attorney for the district in which the subpoena was issued to report such neglect or refusal to the United States District Court and to request such court to issue an order requiring the witness to appear and testify and to produce evidence. 8 C.F.R. § 1003.35(b)(6). In practical terms, an IJ would consult with an ACIJ and the Office of the General Counsel.

MOTIONS TO SUPPRESS

- The test for admissibility of evidence is whether it is probative and its use must be fundamentally fair so as not to deprive an alien of due process of law. *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).
- Although evidence seized during an illegal arrest may be suppressed in a criminal proceeding, the mere fact of an illegal arrest has no bearing on a subsequent immigration proceeding. *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976); *see also INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (stating that the exclusionary rule does not apply to deportation proceedings, absent egregious Fourth Amendment violations which transgress notions of fundamental fairness).
- Absent any indication DHS's Record of Deportable/Inadmissible Alien (Form I-213) contains information that is incorrect or was obtained by coercion or duress, such document is inherently trustworthy and admissible to prove alienage and removability. *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988). One who raises a claim questioning the legality of evidence must come forward with proof establishing a *prima facie* case before DHS will be called upon to justify the manner in which it obtained the evidence. *Id*.

MOTIONS TO RECONSIDER

- Only one motion to reconsider is allowed. 8 C.F.R. § 1003.23(b)(1).
- The motion must be filed within 30 days of the date of a final administrative order.
- A motion to reconsider asserts that the Board made a factual or legal error at the time it rendered the previous decision. *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991); *see also Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006).
- An IJ may, upon own motion, reconsider any case in which he or she has made a decision unless jurisdiction has vested with the Board.
- There is no time limitation for DHS to file a motion to reconsider in removal proceedings; and no DHS time limitations in deportation or exclusion proceedings when the basis of the motion is fraud in the original proceedings or a crime that would support termination of asylum.
- Any departure, including removal, deportation, or exclusion for the United States shall constitute withdrawal of the motion. *But see Matter of Bulnes*, 24 I&N Dec. 57 (BIA 2009) (holding that an alien's departure from the United States while an under an outstanding order of deportation or removal issued *in absentia* does not deprive the IJ of jurisdiction to rescind the order if premised on lack of notice). Circuit courts have significantly limited the applicability of the departure bar and *Matter of Armendarez*,

24 I&N Dec. 646 (BIA 2008).

- The motion must be in writing and signed by the affected party or attorney of record. 8 C.F.R. § 1003.23(b)(1)(i).
- The motion shall state whether the validity of the removal order is subject to any judicial proceedings and, if so, the nature and date thereof, the court in which such proceedings took place or is pending, and its result or status.
- An EOIR-28, Notice of Entry of Appearance, must be filed unless DHS is the moving party. 8 C.F.R. § 1003.23(b)(1)(ii).
- A motion can be reassigned to another IJ if the original IJ is not available. 8 C.F.R 1003.23(b)(1)(iii).
- IJs may set and extend deadlines. A motion is deemed unopposed unless a timely response is made. 8 C.F.R. § 1003.23(b)(1)(iv).
- A response is due within **10** days after the motion is received by the Immigration Court. *See Immigration Court Practice Manual*, Chapter 3.1(b)(iv) (Updated 10/20/17).
- No automatic stay applies, unless the motion involves *in absentia* order. 8 C.F.R. § 1003.23(b)(v).
- The motion must specify errors of fact or law and "shall" be supported by pertinent authority. 8 C.F.R. § 1003.23(b)(2).
- A party may not seek reconsideration of a prior denial of a motion to reconsider.
- A party may not submit new evidence with the motion. *Matter of Cerna*, 20 I&N Dec. 399, 402-03 (BIA 1991).

MOTIONS TO REOPEN

- Only one motion to reopen is allowed.
- A motion must be filed within 90 days of the date of a final administrative order.
- A motion to reopen seeks to reopen proceedings so that new evidence can be presented and a new decision entered on a different factual record, normally after a further evidentiary hearing. *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991).
- An IJ may, upon his or her own motion, reopen any case in which he or she has made a decision unless jurisdiction has vested with the Board. Proceedings should be reopened *sua sponte* only under "exceptional" circumstances. *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997).
- There is no time limitation for DHS to file a motion to reopen in removal proceedings; and no DHS time limitations in deportation or exclusion proceedings when the basis of the motion is fraud in the original proceedings or a crime that would support termination of asylum.
- Any departure, including removal, deportation, or exclusion for the United States shall constitute withdrawal of the motion. *See generally Matter of Okoh*, 20 I&N Dec. 864 (BIA 1994); *but see Matter of Bulnes*, 24 I&N Dec. 57 (BIA 2009) (holding that an alien's departure from the United States while an under an outstanding order of deportation or removal issued *in absentia* does not deprive the IJ of jurisdiction to rescind the order if premised on *lack of notice*). Circuit courts have significantly limited the applicability of the departure bar and *Matter of Armendarez*, 24 I&N Dec. 646 (BIA

2008).

- A motion must be in writing and signed by the affected party or attorney of record. 8 C.F.R. § 1003.23(b)(1)(i).
- The motion shall state whether the validity of removal order is subject to any judicial proceedings and, if so, the nature and date thereof, the court in which such proceedings took place or is pending, and its result or status.
- An EOIR-28, Notice of Entry of Appearance, must be filed unless DHS is the moving party. 8 C.F.R. § 1003.23(b)(1)(ii).
- A motion can be reassigned to another IJ if the original IJ is not available. 8 C.F.R § 1003.23(b)(1)(iii).
- IJs may set and extend deadlines. A motion is deemed unopposed unless a timely response is made. 8 C.F.R. § 1003.23(b)(1)(iv).
- A response is due within **10** days after the motion is received by the Immigration Court. *See Immigration Court Practice Manual*, Chapter 3.1(b)(iv) (Updated 10/20/17).
- No automatic stay applies, unless motion involves *in absentia* order. 8 C.F.R. § 1003.23(b)(v).
  - The motion "shall" state new facts to be proven at the hearing if the motion is granted and "shall" be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3).
- If seeking new relief, the alien must submit applications.
- If granting, an IJ must find the evidence to be material and not previously available and could not have been discoverable or presented at prior hearing.
- IJs cannot grant motion to reopen to apply for discretionary relief if it appears that the alien's right to apply for relief was fully explained by the IJ and an opportunity was given to the alien to apply, unless the relief sought involved circumstances occurring after the hearing.
- IJs may deny a motion in the exercise of discretion even if the alien has established *prima facie* eligibility for new relief.
- A motion to reopen to apply for adjustment of status based on a marriage entered into after the institution of removal proceedings may no longer be denied simply because of the fact of DHS opposition to the motion. *See Matter of Lamus*, 25 I&N Dec. 61 (BIA 2009), *modifying Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002).

Motions to Reopen in the Context of Seeking to Rescind In Absentia Order of Removal, Deportation, or Exclusion

Removal proceedings: An alien in removal proceedings must file a motion to rescind an order of removal entered *in absentia* within 180 days of the date of the order if he or she seeks to demonstrate exceptional circumstances for failure to appear. A motion may be filed at any time, if the basis is lack of proper notice. This applies to cases in which service of the Notice to Appear occurs after April 1, 1997. Section 240(b)(5) of the Act; 8 C.F.R. § 1003.23(b)(4)(ii).

- The term "exceptional circumstances" refers to something exceptional and beyond the control of the alien causing a failure to appear, such as battery or extreme cruelty,

serious illness of the alien, or serious illness or death of a spouse, parent, or child of the alien, but nothing less compelling. Section 240(e)(1) of the Act.

- An alien ordered removed *in absentia* must file a motion to reopen with the IJ; the alien cannot file a direct appeal of the order to the Board (though a party may file an appeal from the IJ's decision on the motion to reopen). *Matter of Guzman*, 22 I&N Dec. 722 (BIA 1999).
- The filing of a motion based either on notice or exceptional circumstances serves as an automatic stay of removal until the IJ issues a decision. Section 240(b)(5) of the Act; 8 C.F.R. § 1003.24(b)(4)(ii).
- With respect to notice of the hearing, there is a presumption of delivery, though an alien may overcome such presumption by, among other things, demonstrating whether due diligence was used to remedy the situation, there was an incentive to appear, prior appearances, or affidavits regarding delivery of notice. *See Matter of C-R-C-*, 24 I&N Dec. 677 (BIA 2008); *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008).
- Notice to counsel constitutes notice to the respondent. *Matter of Barocio*, 19 I&N Dec. 255 (BIA 1985); section 240(b)(5)(A) of the Act; 8 C.F.R. § 1292.5(a).
- Traffic delays and car problems generally do not constitute "exceptional circumstances" for failure to appear. *Sharma v. INS*, 89 F.3d 545 (9th Cir. 1996); *Matter of S-A-*, 21 I&N Dec. 1050 (BIA 1997).

Deportation proceedings – Section 242B: Applies to deportation proceedings when an Order to Show Cause (Form I-221) is served after June 13, 1992 (but before April 1, 1997). Alien may file a motion to rescind an *in absentia* order of deportation within 180 days of the IJ's order if exceptional circumstances are demonstrated, or at any time if proper notice was not received.

Pre-June 13, 1992 deportation proceedings and all exclusion proceedings: A motion to reopen may be granted if the alien demonstrates "reasonable cause" for failing to appear. *See Matter of Nafi*, 19 I&N Dec. 430 (BIA 1987). Time and number limitations do not apply.

When Ordinary Time and Number Limitations Do Not Apply

- Generally, only one motion to reopen an *in absentia* order of removal is permitted (though granting a motion essentially erases the prior history, *i.e.*, an alien may generally file one motion to reopen for each failure to appear). *See generally Matter of M-S-*, 22 I&N Dec. 349, 352 (BIA 1998).
- Time and number limitations on motions do not apply if an application for asylum, withholding, or protection under the United Nations Convention Against Torture is based on changed country conditions in the country of return or to where the alien was ordered removed, if the evidence is material and not previously discoverable. (If prior asylum application was deemed to be frivolous, no motion to reopen or stay can be granted). 8 C.F.R. § 1003.23(b)(4)(i). In addition, alien need not first "rescind" an *in absentia* removal order to reopen to apply for asylum based on changed country conditions. *Matter of J-G-*, 26 I&N Dec. 161 (BIA 2013).

- **In removal proceedings**, an *in absentia* order of removal may be rescinded only upon the filing of a motion to reopen within 180 days if the alien's failure to appear was caused by "exceptional circumstances" under section 240(e)(1) of the Act. 8 C.F.R. § 1003.23(b)(ii). However, there is no time limit for filing a motion to rescind an *in absentia* order of removal if the failure to appear was caused by lack of notice or if the alien was in federal or state custody and the failure to appear was through no fault of the alien. *See Matter of Evra*, 25 I&N Dec. 79 (BIA 2009) (holding that an alien's conduct underlying his arrest and incarceration does not constitute "fault" in failing to appear).
- **In deportation proceedings**, alien must file motion to reopen *in absentia* order within 180 days, 8 C.F.R. § 1003.23(b)(4)(iii)(A)(1), or at any time if based on lack of notice or if alien was in federal or state custody at the time of the hearing. 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2). The filing of such motion provides the alien with an automatic stay of deportation. 8 C.F.R. § 1003.23(b)(4)(iii)(C). Time and number limitations do no apply. 8 C.F.R. § 1003.23(b)(4)(iii)(2)(D).
- **In exclusion and in "old" section 242(b) deportation (OSC issued prior to June 13, 1992) proceedings**, an alien need only show "reasonable cause" for failing to appear. 8 C.F.R. § 1003.23(b)(4)(iii)(B); *see Matter of Cruz-Garcia*, 22 I&N Dec. 1155 (BIA 1999).
- There are no time or number limitations for motions to reopen "agreed upon by all parties and jointly filed." 8 C.F.R. § 1003.23(b)(4)(iv).
- When claiming ineffective assistance of counsel caused an alien to file a motion untimely, whether the alien demonstrated due diligence such that "equitable tolling" is appropriate is decided on a case-by-case basis.

Exceptions To The Time And Number Limitations

MOTIONS TO RECUSE

***See* Operating Policies and Procedures Memorandum (OPPM) 05-02: Procedures For Issuing Recusal Orders In Immigration Proceedings. Effective March 21, 2005.**

MISCELLANEOUS MOTIONS

- Motion For Extension.
- Motion To Accept An Untimely Filing.
- Motion For Closed Hearing.
- Motion To Waive Representative's Appearance.
- Motion To Waive Respondent's Appearance.
- Motion To Permit Telephonic Appearance.
- Motion to Request an Interpreter
- Motion For Video Testimony.
- Motion To Present Telephonic Testimony.

- Motion To Amend.
- Motion To Stay Removal Or Deportation.
- Motion to Reissue
- Motion to Recalendar

This outline is intended as a reference tool only, containing general rules. Any user is strongly encouraged to rely additionally on his or her independent research, including circuit court specific variations to Board law.